Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") be allowed to restrict the scope of *res judicata* to matters actually litigated, as opposed to matters which could or should have been litigated, thus paving the way for piecemeal litigation, causing uncertainty as to the stability of final judgments and causing a waste of judicial resources?

II. Can the Fifth Circuit, contrary to other circuits, adopt a rule which precludes the application of collateral estoppel in any case where there has been a change in the applicable rule of law, even between the same parties?

III. Has the Fifth Circuit's decision, by overturning the district court's undisputed findings of fact, by reopening a lawsuit the federal government lost 50 years ago in violation of *res judicata*, and by expanding the "change of law" exception for collateral estoppel in defiance of this Court's narrowing of that exception in *Stauffer*, "so far departed from the accepted and usual course of judicial proceedings. . . . as to call for an exercise" of this Court's supervisory power?

LIST OF PARTIES

The Petitioners (Plaintiffs-Appellees below) are:

Petro - Hunt, L.L.C.;
Hunt Petroleum Corporation and
Kingfisher Resources, Inc.

The Respondents (Defendants-Appellants below) are:

The United States of America

Other Defendants below are:

Aspect Resources, L.L.C.;
Bayou Petroleum Co.;
Catawba Energy, Inc.;
First Texas Hydrocarbons, Inc.;
Oscar C. Forland;
Gulf Coast Oil & Gas Co.;
Justiss Oil Co.;
MB Exploration, L.L.C.;
Northstar Energy, L.L.C.;
Palmer Petroleum, Inc.;
Howell R. Spear;
John P. Strang;
Wheless T.D.L. Exploration Co., L.L.C.;
Ocean Energy Resources Inc.,
formerly known as UMC Petroleum Corp.;
Devon S.F.S. Operating, Inc.,
formerly known as Santa Fe Snyder Corp.;
J. Bradley Jeffreys;
Energy Arrow Exploration, L.L.C., and
Carruthers Producing Company, Inc.

CORPORATE DISCLOSURE STATEMENT

Petro-Hunt, L.L.C. is a Delaware limited liability company and is wholly owned by the William Herbert Hunt Trust Estate, a Texas Trust. Neither Petro-Hunt nor the parent trust are publicly traded entities.

Hunt Petroleum Corporation is incorporated in Delaware. It is a privately held company. Hunt Petroleum Corporation stock is not publicly traded.

Kingfisher Resources, Inc. is incorporated in Delaware. It is a privately held company. Kingfisher Resources, Inc. stock is not publicly traded. Kingfisher is wholly owned by Rosewood Resources, Inc. ("Rosewood"), a Delaware corporation. Rosewood is a privately held corporation. Its stock is not publicly traded.

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Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., respectfully request that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on March 31, 2004 and revised on May 28, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 365 F.3d 385 (5th Cir. 2004) and is reprinted at Appendix ("App".) A. The denial of the petitions for Panel Rehearing and Rehearing *En Banc* is reprinted at App. B. The original panel opinion is not reported but is reprinted at App. B. The opinion of the United States District Court for the Western District of Louisiana is reported at 179 F. Supp. 2d 669 (W.D. La. 2001), and is reprinted at App. D. The District Court's Judgment is reprinted at App. C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its judgment and opinion on March 31, 2004. The Fifth Circuit issued a "revised opinion" on May 28, 2004. The Fifth Circuit denied the Petition for Panel Rehearing and the Petition for Rehearing *En Banc* on June 1, 2004. This petition has been filed within ninety days of the denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

This case was brought under the Quiet Title Act, 28 U.S.C. § 2409(A).

The Weeks Act, 1911, 36 Stat. 961, codified as amended in scattered sections of Title 16 U.S.C., created the National Forest System. The minerals at issue in this case are situated beneath lands purchased by the United States pursuant to the Weeks Act. The full text of this statute is located at App. F.

Louisiana Act 315 of 1940, now found at La. Rev. Stat. Ann. § 31:149 (West 2004), provides that

> when land is acquired by the United States of America, or any of its subdivisions or agencies . . . , and . . . . oil, gas, and/or other minerals or royalties

> are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas, and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptable.

The complete text of Louisiana Act 315 of 1940 is set forth at App. G.

The Just Compensation Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution provide that "no person shall be . . . deprived of . . . property without due process of law, nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Facts and Background

This case involves the doctrine of *res judicata* - claim preclusion and issue preclusion (collateral estoppel). Consequently, an understanding of the facts of the underlying litigation is necessary to an understanding of the present case.

Petitioners brought this quiet title action claiming title to approximately 180,000 mineral acres located in Grant, Natchitoches, and Winn Parishes in central Louisiana. During the 1930s, five lumber companies pooled their mineral interests in this and other property and formed Good Pine Oil Company ("Good Pine") to act as a holding company for their mineral property. This arrangement allowed all five companies to share in any mineral production from the property, based upon the percentage of the total acreage each company had conveyed to Good Pine. Two of the five lumber companies, Bodcaw Lumber Company of Louisiana, Inc. ("Bodcaw") and Grant Timber Company of Louisiana, Inc. ("Grant") conveyed more than 180,000 acres of mineral interests to Good Pine by six identical conveyance instruments between November 16, 1932 and November 3, 1934.

About the same time, the United States was trying to acquire land for the purpose of establishing a national forest,[1] but was having difficulty buying land in Louisiana because Louisiana's mineral law does not allow a landowner to permanently sever the mineral estate from the surface estate. *See, e.g., Frost-Johnson Lumber Co. v. Sallings Heirs*, 150 La. 756, 91 So. 207 (La. 1922). Mineral interests can only be severed from the surface for a period of 10 years in the absence of drilling or production (with certain statutory exceptions).[2] Thus, if there has been no drilling or production for 10 years (the prescription period), the mineral interest ordinarily reverts to the surface owner. La. Rev. Stat. Ann. § 31:27, 31 (West 2004). *See Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001).

Louisiana landowners were willing to sell the surface to the United States, but not the minerals.[3] In order to solve this problem, the Solicitor's Office for the U.S. Department of Agriculture provided Bodcaw a legal opinion, stating that pursuant to federal law, if the surface was sold to the government, the mineral interests would not prescribe and the grantors could retain their minerals. *Nebo, supra*, 190 F.2d at 1005, 1006. Another solution, provided by the Louisiana Legislature, was passage of Act 315 of 1940, now codified as La. Rev. Stat. Ann. § 31:149 (West 2004), providing that the Louisiana laws of mineral prescription did not apply to land sold to the United States. This statute was later amended to apply to the State of Louisiana as well.

Between 1934 and 1937, Bodcaw and Grant sold to the United States the surface of (more or less) the same 180,000 acres conveyed to Good Pine for mineral development. All of this property was sold for prices between $1.75 and $2.50 per

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1. The government acted pursuant to the Weeks Act, the enabling legislation that created the National Forest System.). *See* Weeks Act, ch. 186, 36 Stat. 961 (1911) (codified, as amended, in scattered sections of 16 U.S.C.).

2. *See* La. Rev. Stat. Ann. § 31:149 - 152 (West 2004).

3. Common law states allow minerals to be permanently severed. There is no direct common-law equivalent to a Louisiana mineral servitude. *Texaco v. La. Land and Exploration*, 136 B.R. 658 (M.D. La. 1992).

acre. R. Doc. 85, Ex. C, pp. 4-8 (Hughes Affidavit). This property is now part of the Kisatchie National Forest which consists of more than 600,000 acres.

Contrary to its earlier representations that the Louisiana rules of prescription would not apply to land sold to the government, the United States filed suit in 1948 to litigate mineral title to approximately 800 acres (part of the 180,000 acres). The court ruled that title to the minerals belonged to Good Pine's successor in interest, Nebo Oil Co. *United States v. Nebo Oil Company*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951). Specifically, the *Nebo* District Court held that Louisiana Act 315 of 1940 could be constitutionally applied -- both retroactively[4] and prospectively -- and that the United States could not and did not acquire the mineral interests by prescription based upon non-use for 10 years. That decision was affirmed in *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951).

Plaintiffs below, petitioners here, are the successors in interest to Nebo Oil Company, and are parties in privity with Nebo for the purposes of this litigation. *See, e.g., S. Pac. R.R. Co. v. United States*, 168 U.S. 1 (1897). Thus, the mutuality requirements of *United States v. Mendoza*, 464 U.S. 154 (1984), are met.

In *Nebo*, both the District Court and the Fifth Circuit recited numerous facts upon which the decision was based. The Fifth Circuit took note of the difficulty the government was having buying land for the national forest.

> Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for National Forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of the servitude which was subject to prescription by 10

4. *See Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669, 673 n.7 (W.D. La. 2001) ("[S]tating that the statute was retroactively applied is a bit of a misnomer. Act 315 of 1940 was merely applied from the moment of its legislative birth . . . .")

> years non-user [sic]. *However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for National Forest purposes.*

190 F.2d 1005 (emphasis added).

The Fifth Circuit upheld the detailed findings of fact of the District Court, and its conclusion that the government did not intend to buy, and did not pay for the minerals. 90 F. Supp. at 86-88; 190 F.2d at 1009-1010.

Nebo found that mineral ownership was not necessary for the purpose of establishing a national forest. In this regard the District Court stated:

> Since the outstanding mineral ownership . . . is not regarded by the United States as interfering with the primary purpose for which the lands were acquired under the Weeks Law, it cannot successfully be argued that Louisiana Act 315 of 1940, which affects only the outstanding title to such minerals, is unconstitutional in violation of Article IV, Section 3, Clause 2, of the Federal Constitution.

90 F. Supp. at 88. Further, the District Court noted:

> Moreover, the minutes of the meetings of the National Forest Reservation [Commission] . . . conclusively prove that the Commission has authorized the acquisition of millions of acres of land subject to the reservation of mineral rights in perpetuity, and has repeatedly authorized the acquisition of tracts where the mineral rights were outstanding in third persons on the ground that "such mineral rights will not interfere with the use of the land for national forest purposes or diminish the value of the land."

90 F. Supp. at 87. *See also* 90 F. Supp. at 90. (The National Forest Reservation Commission decided "it had no authority to

purchase minerals with funds which had been appropriated . . . for national forest purposes.")

After the *Nebo* judgment became final, both Nebo Oil and the government took actions that reflected their shared belief about the broad implications of that judgment. The Nebo company officials recorded the judgment in the land records of Grant, Winn and Natchitoches Parishes, and also filed affidavits claiming title to all of the 180,000 acres, not just the 800 acres described in the government's suit. R. Doc. 85, Ex. B to Ex. C (Hughes Affidavit). As late as April 2001, the Forest Service's own records reflected that this mineral property was held by "third parties" "in perpetuity." R. Doc. 85, Ex. C.

B. Proceedings Below

Notwithstanding that its own records reflected adverse title, in 1991, the Forest Service nominated this property for mineral leasing by the Bureau of Land Management. BLM began issuing mineral leases to members of the public. Petitioners sued to quiet title. The District Court granted petitioners' summary judgment motion based upon *res judicata*, and held all 180,000 mineral acres belonged to petitioners. *Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001.)

On appeal, the Fifth Circuit, citing essentially the same case law as the District Court, reached the opposite result. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385 (5th Cir. 2004). Not only did the Fifth Circuit reverse summary judgment for petitioners, but, surprisingly, it seemed to rule for the government on the title issue, thereby depriving petitioners of a trial on remand. In doing so, the Fifth Circuit rejected, out of hand, the District Court's undisputed finding of facts that all the subject property was "similarly situated" and that title to same was created by identical conveyances and that the government had a "full and fair opportunity" to litigate the question of title to the entire 180,000 acres in *Nebo*. 179 F. Supp. 2d at 682. Further, the Fifth Circuit applied a heretofore narrow exception to the usual collateral estoppel rule, an exception for pure legal issues based upon a change in the prevailing law. *See Restatement (Second) of Judgments* § 28(2). The government argued there was a change in precedent as a result

of *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). Ultimately, the Fifth Circuit held this change in the law precluded the application of collateral estoppel, and that *res judicata* only applied to the 800 acres specifically described in the government's *Nebo* complaint.

Plaintiffs - petitioners filed a Petition for Panel Rehearing and a Petition for Rehearing *En Banc*. Both were denied on June 1, 2004. App. E.

Petitioners now file this Petition for *certiorari*, and seek to have this court remedy the conflict in the circuits created by the Fifth Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. The Court should grant a writ of *certiorari* to resolve the conflict between the Fifth Circuit and the other federal circuit courts, and to remedy the extreme departure from this Court's decisions regarding *res judicata*.

Res Judicata

The Fifth Circuit has eviscerated the doctrine of *res judicata*. If the Fifth Circuit opinion is allowed to stand, the law of *res judicata*, as it applies to private property rights, will become unsettled, due to the split among the circuits created by this rogue opinion. *See, e.g., In re Colonial Mtg. Bankers v. Lopez-Stubbe*, 324 F.3d 12 (1st Cir. 2003); *Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003); *Havercombe v. Dep't of Educ.*, 250 F.3d 1 (1st Cir. 2001); *Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853 (7th Cir. 2001); *Ragsdale v. Rubbermaid, Inc.*,193 F.3d 1235 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000); *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869 (2d Cir. 1991).

All the pertinent claims and issues involving the mineral property in question were raised and litigated to a conclusion more than 50 years ago in *United States v. Nebo Oil Co.*[5] The *Nebo* decision should control the outcome of this case as the District Court found. However, the Fifth Circuit reversed the District Court, purporting to base its decision on the inapposite cases of *United States v. Little Lake Misere Land Co.*,

5. 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951).

Inc., 412 U.S. 580 (1973), and *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). In the process, the Fifth Circuit created a significant conflict with the *res judicata* decisions of other circuits and took the long accepted rules of *res judicata* and collateral estoppel off on a bizarre tangent.

The Fifth Circuit has allowed the government to defeat *res judicata* largely by use of its longevity as a litigant. Under this new rule the government will be able to relitigate directly related claims until it obtains the result it wants. This is exactly the sort of improper litigation conduct this Court found unacceptable in *Montana v. United States*, 440 U.S. 147 (1979); and *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). While the United States may have been given freedom by this Court to relitigate *issues; See United States v. Mendoza*, 464 U.S. 154 (1984); the government cannot relitigate *claims* with the same party, nor the *same issues* with *the same parties*. *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Nevada v. United States*, 463 U.S. 110 (1983).

The Fifth Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise" of this Court's supervisory power. Sup. Ct. R. 10(a). The fundamental purpose of the doctrine of *res judicata* is to deter repetitive and piecemeal litigation and to conserve judicial resources. "*[R]es judicata* and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90,94 (1980). "[T]he doctrine of *res judicata*, judicial in origin, was established for the primary purpose of avoiding repetitive litigation of the same causes of action." *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1232 (2d Cir. 1977), *cert. denied* 434 U.S. 903 (1977). *See also Churchill v. Star Enters.*, 183 F.3d 184 (3d Cir. 1999). The Fifth Circuit did much more than misapply the law. It concocted a *new* rule which substantially restricts the scope of *res judicata* which will unfairly benefit repeat litigants like the United States. "[J]udicial action must be governed by *standard*, by *rule*. Law promulgated by the Legislative Branch can be inconsistent, illogical, and

ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions. *Vieth v. Jubelirer*, __, U.S. __, 124 S. Ct. 1769, 1777 (2004) (Scalia, J., for a plurality) (emphasis by the Court). This Court should exercise its supervisory power, because the Fifth Circuit's aberrant rule has far-ranging, negative implications that go well beyond this litigation.

The Fifth Circuit's Decision Will Encourage Piecemeal Litigation

The Fifth Circuit's decision allows piecemeal litigation, *by the same parties*. In particular, the decision here would allow title to the 180,000 mineral acres to be litigated an acre at a time, thereby wasting valuable judicial resources. All of these 180,000 mineral acres were transferred to Good Pine in six conveyances (four made by Bodcaw and two made by Grant). Significantly, the language in each of the six conveyances is not only "virtually identical," *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984), but, in fact, *is identical*. All of this property is contained in two rather large tracts in close proximity. R.Doc. 88, Ex. A, Ex. C (map).

Between 1934 and 1939, Grant and Bodcaw conveyed the surface of these lands[6] to the United States in nine conveyance instruments. All of the conveyances were subject to the outstanding mineral servitudes. R.Doc. 85, Ex. C.[7] *See also* 179 F. Supp. 2d at 674.

In its ruling, the *Nebo* District Court specifically found the government did not need the minerals for the purpose of a national forest, did not pay for the minerals and did not intend to buy the minerals. Also, the government represented that under federal law the Louisiana prescriptive rules would not apply to this mineral property. The *Nebo* District Court held that Act 315 of 1940 did not deprive the government of any

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6. This suit involves title to mineral property of approximately 180,000 acres±. The title to the surface for the most part overlays this 180,000 acres, but is not exactly identical to the particular 180,000 acres of mineral property to which plaintiffs-petitioners claim ownership. R. Doc. 85, Ex. C.

7. Approximately 1,000 acres of the property at issue here was acquired by the United States by two expropriation suits. This property was also acquired subject to the mineral servitudes and mineral interests of Good Pine Oil. R. Doc. 85, Ex. C at 5,7.

bargain it had made. *Nebo*, 90 F. Supp. at 86-88, *aff'd*, 190 F.2d at 1005-1010.

Thus, Act 315 of 1940 did no more than effectively codify the government's title opinion. Both the title opinion and Act 315 of 1940 denied the government the right to acquire the minerals appurtenant to the surface by prescription of non-use.

The United States claims it filed suit against Nebo Oil in 1948 because Nebo was "threatening to drill" on the 800 acres it selected for the suit (out of 180,000 acres.)[8] However, it seems apparent the reason for the litigation was to test the waters and to challenge the constitutionality of Act 315 of 1940, even though the government was acting completely counter to its 1935 title opinion given only 13 years earlier.

By this time there had already been significant litigation over Act 315 of 1940. *See Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co., Inc.*, 212 La. 949, 33 So. 2d 693 (1947). In *Whitney Bank*, the Louisiana Supreme Court had declined to rule on the ultimate constitutionality of Act 315 of 1940 because the United States was a necessary party to that litigation. That court, however, did rule there was no vested right in a prescriptive rule, and with adequate notice the legislature could change a prescriptive period.

Little Lake Misere

In the early 1970's the government obtained a result contrary to the *Nebo* case in *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973). However, even there the Supreme Court distinguished *Nebo* on its facts in a footnote. 412 U.S. at 586 n.4. *Little Lake* held Act 315 of 1940 could not be constitutionally applied in that case where the government had acquired land pursuant to the Migratory Bird Act, an entirely different statutory scheme from the Weeks Act. *Little Lake* turned on choice of law analysis; the majority held under the *Clearfield Trust*[9] doctrine, federal, rather than state law was to apply. The majority rejected Act 315 of 1940 as

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8. Reply Brief as Appellant and Response Brief as Cross-Appellee of the United States, p. 26. (In the record but not yet numbered by the court).

9. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

"aberrant or hostile" to the government. Consequently, this Court did not overrule the Fifth Circuit's *Nebo* decision which found Act 315 of 1940 passed constitutional muster. 412 U.S. at 606. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). Then Associate Justice Rehnquist, concurred in the judgment, but wrote that the Court should have addressed the constitutionality of Act 315 of 1940, rather than side step the issue by choice of law analysis. *See* 412 U.S. at 606. (Rehnquist, J. concurring.) *See also id.* at 603 (Stewart, J., concurring.)

The Present Case

Approximately forty years after *Nebo*, the United States, rather than file its own quiet title action, unilaterally began to issue mineral leases on this land, which its own records reflected it did not own. R.Doc. 85, Ex. G.; 8:761. Plaintiffs complained and eventually filed suit.

In the instant litigation, the District Court found that title to the entirety of the property was vested in plaintiffs - petitioners, as successors in interest to Nebo, as a result of the doctrine of *res judicata*.[10] *Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001).

As this Court has explained:

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. [citations omitted]

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.5 (1979).

In this case, the Fifth Circuit has confused the two rules, and has effectively held that *res judicata* only bars claims actually litigated. "In general, a judgment is *res judicata* not

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10. As noted by the District Court, *res judicata* pertains to claim preclusion and issue preclusion. *See, e.g.*,18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 4402 (2002).

only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in that suit." *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946). Further, the rule, as set forth by this Court many years ago, requires litigants to litigate all of their related claims at once rather than on a piecemeal basis. *Grubb v. Pub. Utils. Comm'n of Ohio*, 281 U.S 470, 479 (1930).

The Same Claim or Related Claims

The facts to be considered when determining if the two actions are the same or so closely related to constitute the same claim are:

> [T]heir relatedness in time, space, origin or motivation, and whether, taken together, they form a convenient unit for the purposes of trial. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses and proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded.

Restatement (Second) of Judgments, § 24, cmt. b.[11]

Here the facts show the claims or causes of action in the present case are the same claims that were or could have been litigated in *Nebo*. The six mineral conveyances are all identical in their terms. The grantors are the same; the grantees are the same. The purpose for which the conveyances were made are the same. The conveyances to the government were made by the same grantors as the grantors to Good Pine, and were all for the purpose of the national forest. The language in all the conveyance instruments to the government is materially or

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11. The Fifth Circuit has previously adopted this so called "transaction test" from *Restatement (Second) of Judgments*, § 24. *See Agrielectric Power Partners v. Gen. Elec. Co.*, 20 F.3d 663 (5th Cir. 1994). Other Circuits have adopted the transaction test as well. *See, e.g., In re Iannochino*, 242 F.3d 36 (1st Cir. 2001); *Monahan v. New York City Dep't. of Corr.*, 214 F.3d 275 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000); *Mass. Sch. of Law, Inc. v. Am. Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998); *Andersen v. Chrysler Corp.*, 99 F.3d 846 (7th Cir. 1996) and *W. Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992).

"virtually identical."[12] *See Stauffer*, 464 U.S. at 173. Further, all of the conveyances had been made and were extant by the time of the *Nebo* litigation. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 4425 (2002) (hereinafter "Wright & Miller"). Had the government included the entire 180,000 acres in the *Nebo* litigation it is obvious the evidence and the testimony would have been virtually the same. The only additional evidence would likely have been the additional conveyance instruments themselves, which are all alike anyway. As found by the District Court, if all 180,000 acres had been included, "it would not have changed the decision of that [*Nebo*] Court." 179 F. Supp. 2d at 682.[13]

The Fifth Circuit complained that neither the District Court nor petitioners provided or identified "a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full enjoyment and use of only one of them."

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12. "In addition, all of the surface of the disputed acreage was acquired by the United States pursuant to the Weeks Act and none of the language in such deeds or mineral reservations would have warranted a different legal conclusion at the time of *Nebo Oil*. Accordingly, this Court finds that the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*." 179 F. Supp. 3d at 682.

13. "The United States concedes that the ownership of the mineral rights underlying the 800 acres involved in *Nebo Oil* was decided and cannot be revisited here." (Def.'s Opp.M.Summ.J., pg. 11 [Doc. 133]). This Court also finds that the Fifth Circuit applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract to the United States, of which the 800 acres was a part. Accordingly, those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies.

As previously discussed, this Court finds that the five other servitudes and the later mineral reservations burdening the 180,000 acres are virtually identical to the servitude and reservation at issue in *Nebo Oil*. . . .

From an examination of *Nebo Oil*, it is obvious that had the government elected, as plaintiff in *Nebo Oil*, to include all similarly situated acreage in that suit, it would not have changed the decision of that Court. The government has had a "full and fair opportunity" to litigate the application and constitutionality of Louisiana Act 315 of 1940 to this mineral property. The government should not be allowed to litigate now that which it could have litigated 50 years ago." 179 F. Supp. 2d at 682.

365 F.3d at 396. The Fifth Circuit thus rejected the District Court's undisputed findings of fact, without a single word about any standard, "clearly erroneous," or otherwise, for such review. While the *de novo* standard applies to review of summary judgments, the Court of Appeals is not, or should not be, free to change the undisputed facts found by the District Court. *See, e.g., Inwood Labs. v. Ives Labs.*, 456 U.S. 844 (1982). The District Court did not find this property was "separate," as characterized by the Fifth Circuit. Rather, the District Court found that the property was all "similarly situated," that is, alike in all pertinent respects. 179 F. Supp. 2d at 682.

Similar Land Title Cases

Petitioners provided the District Court and the Fifth Circuit with the following decisions, all of which involved litigation of title to similarly situated land in successive cases. In each case the court held the decision as to title in the first litigation controlled as to the second litigation. Premier among these cases is *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1 (1897). *See also United States v. Nevada*, 463 U.S. 110 (1983); *United States v. S. Pac. R.R. Co.*, 146 U.S. 570 (1892); *United States v. Colton Marble and Lime Co.*, 146 U.S. 615 (1892); *Moore v. Swayne-Hunter Farms, Inc.*, 841 S.W.2d 308 (Mo. Ct. App. 1992); *Peasley v. State*, 424 N.Y.S.2d 995 (N.Y. Ct. Cl. 1980); *Custer v. Hall*, 71 W. Va. 119, 76 S.E. 183 (W. Va. 1912).

The case of *Southern Pacific R.R. Co. v. United States, supra*,[14] presents an analogous set of facts. In *Southern Pacific*, the United States brought suit to quiet title to lands along a railroad right of way. In previous decisions[15] this Court had found that certain maps determined title to land depicted on those maps, and ultimately the maps determined the title to land along the railroad right-of-way. In the 1897 case, this Court held that the maps, determinative of title in one case, were determinative of title to all the other land depicted on the maps. In so finding the Court stated:

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14. *Southern Pacific* is pertinent here even though it is also regarded as a collateral estoppel case. *Burlington N. R.R. Co. v. Hyundai Merch. Marine Co., Ltd.*, 63 F.3d 1227, 1232, n.3 (3d Cir. 1995).

15. *United States v. S. Pac. R.R. Co.*, 146 U.S. 570 (1892); and *United States v. Colton Marble and Lime Co.*, 146 U.S. 615 (1892).

> The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in the subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

168 U.S. at 48-49.

In *Moore*, the court held that a condemnation proceeding in 1960 to condemn about ten acres of a 160 acre tract had conclusively decided title to the entire 160 acres, and the 1960 judgment barred the same litigants or their privies from relitigating title to the remaining 150 acres in a later suit. In so holding, the court, citing older authority, said:

> In *Custer v. Hall* [citation omitted] it is held that an adjudication of title to a particular tract of land, or an undivided interest therein, is conclusive between the same parties with respect to the title to another tract claimed adversely by them, in the same manner and under the same chain of conveyances.

841 S.W.2d at 313; *Custer v. Hall*, 71 W. Va. 119, 71 S.E. 183 (1912).

In *Peasley v. State, supra*, the New York Court of Claims held collateral estoppel barred the State of New York from relitigating title to a portion of a parcel of land where it had previously been decided the state had no title to another portion of that parcel of land. The court noted the state had a "full and fair opportunity" to litigate the title issue in the first suit. A precise selection of a part of similarly situated acreage in the first suit did not mean the state could litigate title to the remainder in a subsequent suit. 424 N.Y.S.2d at 1001.

In *Nevada v. United States*, 463 U.S. 110 (1983), this Court did not allow the United States to relitigate issues involving a court approved settlement agreement concerning rights to water from

the Truckee River for the benefit of an Indian reservation. Judgment was entered in 1944. Twenty-nine years later the government sought to relitigate title to the water rights and to enhance those rights for certain parties in the original litigation. In explaining the rules of *res judicata*, this Court stated:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

463 U.S. at 129-30. (quoting from *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

Further, the Court stated in a footnote:

> The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. [citations omitted] "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and *many titles may be injuriously affected by their change*. . . .[W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

463 U.S. at 129 n.10 (quoting *Minn. Co. v. Nat'l Co.*, 70 U.S. (3 Wall.) 332, 334 (1866)) (emphasis added).

Claims That Were or Could Have Been Litigated

The rule of *res judicata* applies to all claims which were or could have been previously litigated. *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). As another circuit has explained: "[T]he fact that *res judicata* depends on 'an identity

of claims' does not mean that an imaginative attorney may avoid preclusion by attaching a different legal label to an issue that has, or could have been litigated." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077-78 (9th Cir. 2003).

It is incontrovertible that the government could have litigated title to the entire 180,000 acres in *Nebo*. As explained by the District Court below: "The government is not free to select a particular 800 acres, litigate over that, lose, and then re-litigate other parcels of land which are similarly situated." 179 F. Supp. 2d at 681. The Fifth Circuit's decision in the instant case changes the rule espoused in *Jefferson County*, and restricts *res judicata* to matters *actually* raised in the prior litigation.

In assessing whether a claim could or should have been brought in prior litigation, previous Fifth Circuit decisions have considered "whether and to what extent [a party] had "actual or imputed awareness . . . of a real potential for claims . . . such as those asserted" in the later proceeding, and whether the initial venue afforded an opportunity to allow such claims to be effectively litigated. *In re Intelogic Trace, Inc.*, 200 F.3d 382, 388 (5th Cir. 2000). If these conditions are met, the claims could or should have been brought together and *res judicata* will apply.

> In the Eleventh Circuit, [t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions not their form.

Ragsdale v. Rubber Maid, Inc., 193 F.3d 1235, 1239 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000), citing, *Citibank N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1503. (11th Cir. 1990). *See also In re Colonial Mtg. Bankers v. Lopez-Stubbe*, 324 F.3d 12, 20 (1st Cir. 2003) ("[R]es *judicata* bars not only those theories that were actually litigated in the earlier action, but those theories that could have been litigated . . ."); *Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853, 857 (7th Cir. 2001) ("[F]or purposes of *res judicata* a claim is not an argument or a ground but the events claimed to give rise to a right to a legal remedy.")

The United States was in possession of the surface at the time of *Nebo*. The petitioners' six mineral servitudes were each outstanding and a matter of public record for less than the 10 year prescriptive period when Act 315 of 1940 was enacted. 179 F. Supp. 2d at 682. Certainly, the United States knew the potential for other claims existed against Nebo Oil at the time it instituted the *Nebo* litigation.

The government's contention that its title claims were "not ripe" for adjudication in the previous action because the prescriptive period of non-use had not run against other parts of the 180,000 acres was quickly and correctly rejected by the District Court: "There was no reason for the United States to wait 10 years to litigate title to property whose owners claimed it would never prescribe." 179 F. Supp. 2d at 676.

Res judicata is the linchpin of the litigation process. The District Court was correct in finding the scope and breadth of the rule of *res judicata* encompasses all of this similarly situated property, and that title to the entire 180,000 mineral acres was decided by *Nebo*. The Fifth Circuit's new rule substantially restricts the scope of *res judicata*, and is at odds with the other Circuits and decisions of this Court. The finality of judgments fulfills the ultimate goal of litigation, which is to permanently resolve disputes among citizens. *Res judicata* should be uniformly applied in the circuits, and *certiorari* should be granted to achieve this uniformity.

A Red Herring

Part of the Fifth Circuit's error lies in the confusion created by the government introducing a red herring. Plaintiffs filed a summary judgment motion based on *res judicata* and collateral estoppel, and also filed an alternative motion for summary judgment based on the amount of acreage title to which would be held by the Louisiana prescriptive rules (drilling or production) even in the absence of Act 315 of 1940.[16] In support of the second motion, plaintiffs' title examiner, Daniel C. Hughes, Esq., opined in an affidavit that for the purpose of determining which areas would be held by drilling or

16. The District Court ordered the parties to file summary judgment motions "as to all issues that may potentially be resolved by such motions." R.4:321.

production in the absence of Act 315 of 1940, the 180,000 acres was separated into 96 "servitudes" or areas. This determination is based upon a concept in Louisiana title law known as "contiguity" or contiguous tracts that are not subdivided by navigable waterways, or fee title roads or railroads, etc. R.Doc. 88, Ex. A; La. Rev. Stat. Ann. § 31:64 (West 2004). This determination has nothing to do with the conveyance instruments.[17] As found by the District Court, all of these facts are irrelevant to the issue of title, assuming the application of Act 315 of 1940. 179 F. Supp. 2d at 678. However, the government led the Fifth Circuit to believe there were 96 "separate" or stand alone pieces of property. This is simply not true.

The government also misled the court by its assertion that every conveyance and every mineral servitude and its production history constitute different operative facts. The mineral histories of the servitudes are irrelevant to an inquiry into the reach and constitutionality of Act 315 of 1940. 179 F. Supp. 2d at 678. Even the Fifth Circuit conceded that, for the purpose of determination of applicability of Act 315 of 1940, the drilling histories were irrelevant. 385 F.3d at 397. The government led the Court to believe the 800 acres selected by the government in *Nebo* was one of the 96 servitudes. It is actually only a part of one.[18]

As noted by the District Court, petitioners assert that the servitudes are held in perpetuity for so long as the surface is held by the government. 179 F. Supp. 2d at 676. Therefore, use of the servitudes is immaterial. The District Court's determination, that all of the mineral conveyances were virtually identical and all of the property was similarly situated

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17. By way of example, assume 100 acres is contained in a mineral servitude; one well drilled anywhere on that 100 acres would not be sufficient to hold title to that acreage for 10 years unless the entire 100 acres was "contiguous." So that if the 100 acre tract is bisected by a navigable river, there would be two individual "servitudes" and each would require use by drilling or production to toll the 10 year prescriptive period.

18. This can be determined by comparing the property description in the government's *Nebo* complaint with the information in Mr. Hughes' affidavit. The latter is in the record, the former in the public record. R.Doc. 85, Ex. C.

in terms of location, time, manner and purpose of creation, was sufficient to support its finding there was a common nucleus of operative facts. It, thus, was unnecessary, as the District Court found, to delve into 96 separate and redundant inquiries as the government suggested.[19]

II. This Petition should be granted to resolve the split in the circuits regarding the narrow exception to collateral estoppel for a "change in the law."

Issue Preclusion

If for some reason *res judicata* is thought not to apply, barring relitigation to title to the entire 180,000 acres, then it seems imminently clear that collateral estoppel does apply. However, the Fifth Circuit found two reasons why collateral estoppel did not apply: one contrived by the government, and one based on the Fifth Circuit's substantially expanded "exception" to the usual collateral estoppel rule that effectively vitiates the rule. 365 F.3d 385, 397-398. The Third Circuit rejected a virtually identical proposed exception, finding the exception would "swallow . . . the rule." *O'Leary v. Liberty Mutual Ins. Co.*, 923 F.2d 1062, 1067 (3d Cir. 1991). The Fifth Circuit's new rule allows any change in the law to defeat collateral estoppel.

The previous Fifth Circuit law on collateral estoppel was fairly mainstream. "Collateral estoppel depended on three elements: (1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action." *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995). Some cases list a fourth element: "there is no special circumstance that would render preclusion inappropriate or unfair." *See, e.g., United States v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994). The government, however, argued that an exception should be engrafted onto this general rule.

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19. "This Court does not believe that 96 separate or mini trials are necessary for the resolution of the issue of *res judicata*." *Petro-Hunt*, 179 F. Supp. 2d at 676.

The Change in the Law

The government argued, and the Fifth Circuit found, that *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973)[20] changed the prevailing law insofar as it held that Act 315 of 1940 could not be constitutionally applied to defeat the government's claim of prescription of non-use where the government had purchased property in Louisiana pursuant to the Migratory Bird Act. Thus, the asserted "change" arose from the government's own prior litigation. In *Little Lake*, this Court distinguished the *Nebo* case on its facts, and in so doing the Court stated:

> The Court of Appeals [in the *Nebo* case] also emphasized that officials of the Department of Agriculture had represented to the government's vendor that "the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for National Forest purposes." [citations omitted] The Court of Appeals noted that the price paid by the government did not reflect the value of any mineral rights and that the vendor would not have agreed to the land sale absent the government's representation that Louisiana prescription law would not apply.

412 U.S. at 586 n.4.

Thus, this Court recognized the fact driven nature of the *Nebo* litigation. The *Little Lake* case does not overrule *Nebo*. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881, 889 (5th Cir. 2001). *See also Little Lake*, 412 U.S. at 606. While the law may have changed, the facts have not. The new rule from *Little Lake*, applied to the *Nebo* facts, would not change the result in *Nebo*. The rationale of *Little Lake* was that pursuant to the *Clearfield Trust* doctrine, Act 315 of 1940

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20. Judge Walter, the District Judge in this case was the U.S. Attorney for the government before the District Court and the Fifth Circuit in *Little Lake*. With this background, his opinion should have been given great deference, yet the Fifth Circuit ignored his findings of fact and conclusions of law.

was "aberrant or hostile" to the government since it deprived the government of its "bargained for contractual rights," presumably to eventually acquire the minerals. *Little Lake*, 412 U.S. at 595-97. However, in *Nebo*, not only did the government not bargain for the minerals, the *Nebo* court found the government did not intend to buy the minerals, and did not pay for them, and did not need the minerals for national forest purposes. *Nebo*, 190 F.2d at 1005-1010. Thus, it cannot be successfully argued that, given these facts, Act 315 of 1940 is "aberrant or hostile" to the government because the government is not deprived of anything for which it bargained.

The government's arguments that *Little Lake* changed the law with respect to application of Act 315 of 1940, as a matter of *stare decisis*, may be true; however, this case is not about *stare decisis*, but about *res judicata* and collateral estoppel. It is well established that a party who has lost in federal civil litigation cannot relitigate the very same case years later just because the underlying constitutional provision [in this case the Contract Clause] has "evolved." *See* Wright & Miller, *supra*, § 4415 at 369-370 (2002). ("Change in the controlling principles of law ordinarily does not warrant denial of claim preclusion"). *See also Tomlin v. McDaniel*, 865 F.2d 209 (9th Cir. 1989); *United States v. Real Prop. Described at 3947 Locke Ave.*, 164 F.R.D. 496 (C.D. Calif. 1995).

Nevertheless, the government sought to use the change in precedent to invoke what has heretofore been a narrow exception to the collateral estoppel rule based on a change in the prevailing law pursuant to *Restatement (Second) of Judgments*, § 28(2) (1982), or an "unmixed question of law" (as opposed to a mixed question of law and fact) pertaining to "unrelated subject matter." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984); citing *United States v. Moser*, 266 U.S. 236, 242 (1924): As Justice Rehnquist explained:

> As commonly explained, the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of

> fact if those issues were conclusively determined in a prior action. [citations omitted] Our cases, however, recognize an exception to the applicability of the principles of collateral estoppel for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *Montana v. United States, supra,* 440 U.S. at 162. [other citations omitted] . . . While our discussion in *Montana* indicates that the exception is generally recognized, we are frank to admit uncertainty as to its application. The exception seems to require determination as to whether an "issue of fact" or an "issue of law" is sought to be relitigated and then a determination as to whether the "issue of law" arises in a successive case that is so unrelated to the prior case that litigation of the issue is unwarranted. Yet we agree that, for the purpose of determining when to apply an estoppel,
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> > [w]hen the claims in two separate actions between the same parties are the same or closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purpose of issue preclusion . . . . in such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of "law." *Restatement (Second) of Judgments, § 28, comment b (1982).*

464 U.S. at 171.

In *Stauffer*, this Court rejected the government's arguments calling for a broader exception based on a change in the law. 464 U.S. at 172 n.5. Comment b to § 28 of the *Restatement (Second) of Judgments*, continues by saying:

> Thus, if a corporation issues a series of notes for the repayment of a loan, and the holder of the

> notes brings an action on one of them, and the corporation's defense that issuance of the notes was ultra varies is rejected by the court, the judgment is conclusive on that issue in a subsequent action on another of the notes.

It is logically difficult, if not impossible, to distinguish between identical corporate notes and identical conveyance instruments.

Contrary to the obviously limited role this Court found the exception (or exceptions)[21] plays, the Fifth Circuit stated: "In this Circuit, collateral estoppel applies to 'pure questions of law' only when there has been no 'change in controlling legal principles.'" 365 F.3d at 397.

A Split in the Circuits

Such a broad rule was specifically considered by the Third Circuit, and rejected.

> Even if there were a settled change in the law .... we still would be unable to give the O'Learys the benefit of the evolving jurisprudence by permitting them to relitigate the issue [auto insurance issue]. Contrary to the O'Learys' assertion, § 28(2)(b) does not stand for the proposition that an issue, once litigated and resolved, may be reopened whenever the governing law changes or clarifies. Such a broad exception would swallow the general rule, greatly undermining the twin goals of collateral estoppel -- the avoidance of repetitive litigation and the promotion of finality of judgments.

O'Leary v. Liberty Mutual Ins. Co., 923 F.2d 1062, 1069 (3d Cir. 1991).

The Fifth Circuit has not fully addressed the exception for a change in the law and the revised opinion does not

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21. Some cases suggest there are two exceptions for changing law rather than one. The *Stauffer* exception should apply whether the law has changed or not changed. *Stauffer* and the *Restatement*, § 28(2), should be reconciled, or the *Restatement* rejected. Only this Court can do so.

fully discuss the matter either. However, other circuits have. In *O'Leary*, the Third Circuit held that the "unrelated subject matter" aspect of *Stauffer* and *Restatement (Second) of Judgments*, § 28(b), was also a prerequisite to the "change in the law" exception. *See* 923 F.2d at 1069. In *O'Leary*, the plaintiff had been injured in an automobile accident while driving a company owned vehicle. The state law allowed him only to recover worker's compensation benefits, and denied him the right to pursue the employer's uninsured motorist coverage. Subsequently, several cases suggested a change which would allow injured workers to pursue uninsured motorist claims. Based on those cases, O'Leary filed another suit seeking to invoke the new law. The court held that if there was a change in the law it could not benefit *O'Leary*, since the second case did not involve "unrelated subject matter," but involved the same subject matter. The court said "unrelated subject matter" would require a subsequent automobile accident. 923 F.2d at 1069. *See also Burlington N. R.R. v. Hyundai Merch. Marine, Co., Ltd.*, 63 F.3d 1227 (3d Cir. 1995), which also addresses the "unrelated subject matter" aspect of *Stauffer*. A split has occurred because the Fifth Circuit ignored this prong of *Stauffer*.

In *Burlington*, one of the litigants suggested that *Stauffer* had rejected or overruled the exception. The Third Circuit found that the exception survived, but refused to apply the exception in that case. The court referred to reservations about *Stauffer*, and seemed to tacitly ask for further elucidation from this Court about this rather limited exception:

> [I]t remains unclear just where the court's opinion [*Stauffer*] will lead. It is confessed that there is no clear sense of the purpose that may limit preclusion as to matters of law. No attempt is made to work through the difficult policies that may apply in different settings, so as to push preclusion closer to abstract issues of law or to confine it closer to commingled issues of law and common fact.

Burlington, 63 F.3d at 1235, 1239, and n.10, quoting from Wright & Miller, *supra*, § 4425 at 198 (1994); *accord O'Leary*, 923 F.2d at 1067 ("proper application of § 28(2)(b) is largely unplumbed by the case law").

The case of *Steen v. John Hancock Mut. Ins. Co.*, 106 F.3d 904 (9th Cir. 1997), appears to be generally in accord with *O'Leary* and *Burlington*. The D.C. Circuit and the Eleventh Circuit also apply the "change in the law" exception differently from the Fifth Circuit. *See Beverly Health & Rehab. Servs., Inc. v. Nat'l Labor Relations Bd.*, 317 F.3d 316, (D.C. 2003); *Precision Air Parts, Inc. v. AVCO Corp*, 736 F.2d 1499 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). *See also N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429 (11th Cir. 1993).

Here all of the facts were in existence and established prior to the first litigation. The operative facts, i.e. the various conveyances, have never changed. The subject matter is, thus, the same.[22] *See also* Wright & Miller, *supra*, § 4425 (2002).

Another Red Herring Misled the Fifth Circuit

Not only did the government argue that *Little Lake's* "change in the law" should be applied to defeat collateral estoppel, but the government also disingenuously suggested the "threshold choice of law issue" from *Little Lake* constituted an issue that had not been litigated in *Nebo*, thus bootstrapping the "change in the law" into what it characterized as an unlitigated issue. Government Fifth Circuit Brief at 43.

It is evident that what the government described as a "threshold choice of law issue" from *Little Lake* is the same

22. As noted by Judge Walter, the drilling histories of the property are of no importance with respect to application of Act 315. *Petro-Hunt v. United States*, 179 F. Supp. 2d 669, 676 (W.D. La. 2001). The Fifth Circuit's decision vacillates on the matter. First the decision describes the drilling histories as "most important" (Fifth Circuit opinion, p. 21) and several pages later concedes that with respect to application of Act 315, the drilling histories were irrelevant. (Panel Opinion, p. 24). App. A, p. 22a; 24a; B, p. 50a, 53a.

as the "change in the law" per *Restatement (Second) of Judgments*, § 28(2). No one, including the government, knew that the so called "threshold choice of law issue" existed until this Court decided *Little Lake*. The "threshold choice of law issue" the government insisted had to be addressed is nothing more than a reconstruction of the arguments the government originally made in *Nebo*. *See* Government Brief in *Nebo*. App. J, p. 128a. When the government filed the *Nebo* case it sought to litigate the "claim" of title. "[I]t is settled that a "claim" for purposes of the rule [preclusion] means all legal theories bearing on a set of facts; an omitted argument cannot be raised later." *United States v. County of Cook, Ill.*, 167 F.3d 381, 385 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999).[23] It is circular for the government to argue that it did not have a chance to litigate the newly minted rule, and that therefore the "issue," i.e, the new rule of law, was not decided in the prior case. By definition the "new law" would never have been "decided" in a prior case.

Actually, the issue of whether state or federal law applied was essential to the court's determination in *Nebo*. Regardless of the manner in which the government originally presented its choice of law argument, the District Court did make a choice of law analysis. A litigant should not be allowed to disturb a final judgment simply by employing a more refined or sophisticated incarnation of arguments previously put before the court.

That the *Nebo* court did, of necessity, made a choice of law determination, whether state or federal law should apply, is evident from the following:

> Where the United States has not acquired exclusive jurisdiction, or, stated conversely, where the United States and a state have concurrent jurisdiction, the Supreme Court has

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23. The Court in *Cook County* referred to a "claim" but cited, in support of this proposition, *Stauffer* and *Mendoza*, usually associated with issue preclusion; the court also referred to *Nevada* and *United States v. Moser*, 266 U.S. 236 (1924). This mixture of cases highlights the overlap between claim and issue preclusion.

> repeatedly upheld State legislation which does not interfere with the purpose for which the land was acquired by the United States.

Nebo, 90 F. Supp. at 85.

Having established the concurrent jurisdiction of both state and federal governments in the dispute, the court turned to the second half of its analysis: which law should apply, and whether Act 315 of 1940 was hostile to the federal government's contractual interests. The Court found:

> Where the jurisdiction of the United States is *concurrent* with the jurisdiction of the state, however, as is the case where lands have been acquired under the Weeks Law, it is uniformly held that the state statutes enacted after the land is acquired are applicable unless they interfere with the purpose for which the land was acquired by the United States.

90 F. Supp. at 88. (emphasis in the original)

In its brief before the Fifth Circuit in *Nebo*, the government made a choice of law argument and their brief even has a reference to the *Clearfield Trust* decision. *See* Brief of the United States before the District Court in *Nebo Oil*, p. 10 (filed February 24, 1950). *See* App. J, p. 128a.[24] Thus, the "threshold choice of law issue" is another false trail.

The Fifth Circuit's Analysis Was Incomplete

In its original opinion, dated March 31, 2004, the Fifth Circuit had relied on *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991), for its sweeping "change in the law" exception. App. B, p. 53a. Petitioners pointed out in their Petition for Rehearing that this opinion in *Society* had

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24. Even if the underlying case is thought to be incorrectly decided, "[a] fact question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Montana v. United States*, 440 U.S. 147, 162 (1979) (citing and quoting from *United States v. Moser*, 266 U.S. 236, 242 (1924)). The issues resolved in *Nebo* must be given preclusive effect. *See also O'Leary v. Liberty Mutual Ins. Co.*, 923 F.2d 1062 (3rd Cir. 1991).

previously been vacated when the Fifth Circuit granted rehearing *en banc*.[25] The Court denied the requests for panel rehearing and rehearing *en banc*, but nevertheless issued a virtually identical revised opinion withdrawing reference to the vacated *Society of Separationists* case. In its place the court cited *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. Unit A Dec.1981) (which found that the "change in the law" exception did not apply). The Court also cited *Montana v. United States*, 440 U.S. 147 (1979), *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948) and other authority.[26] However, what is conspicuously absent is any meaningful discussion of *Stauffer*. The Fifth Circuit said the government was not relying on the "unmixed question of law" pertaining to "unrelated subject matter" exception from *Stauffer*, 365 F.2d at 397 n.63. The opinion seems to suggest that there is a difference between a "pure question of law", and an "unmixed question of law." Moreover, the Fifth Circuit's decision is clearly in conflict with the Third Circuit's requirement that the second suit must involve "unrelated subject matter" in order for the "change in the law" exception to apply. *O'Leary*. 923 F.2d at 1067.

Additionally, the Fifth Circuit failed to realize that the issue of constitutionality of Act 315 of 1940 was a mixed question of fact and law, and not a "pure question of law." The *Nebo* court did not find Act 315 of 1940 to be constitutional in a vacuum.

The present Fifth Circuit decision relies on a purported exception to collateral estoppel based on any change in the prevailing law. This identical concept was specifically rejected by the Third Circuit in *O'Leary*. Further, as noted in *O'Leary*, the Fifth Circuit's version of the exception would "greatly undermine the . . . goals of collateral estoppel." 923 F.2d at 1067. This Court should grant *certiorari* to resolve this conflict in the circuits and avoid this harmful result.

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25. *See Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. 2004); *Littlefield v. Forney Indep. Sch. Dist.*, 108 F. Supp. 2d 681, 705 n.9 (N.D. Tex. 2000); 5th Cir. Local R. 41.3.

26. Reliance on *Sunnen* was misplaced. *Stauffer* limits *Sunnen* to tax cases. 464 U.S. at 579 n.5.

III. If this decision of the Fifth Circuit is allowed to stand then the United States government will have acquired valuable mineral property without paying for it, in violation of the just compensation clause of the Fifth Amendment to the United States Constitution.

There was a judicial determination fifty years ago that the United States did not pay for 180,000 acres of mineral property, but only paid for the surface. *See Nebo, supra,* 79 F. Supp. at 89-90, *aff'd.*, 190 F.2d at 1005-1006. The Fifth Circuit in this case has determined that the mineral property is subject to the Louisiana rules of prescription.

If the Fifth Circuit decision becomes final, the government will immediately be vested with title to approximately 58,000 mineral acres (area not held by use). Thus, the Fifth Circuit has held, in two separate lawsuits, that the government has not paid for the mineral interests that the Fifth Circuit now says it owns.

Because the Fifth Circuit has established that the government has not paid any compensation, just or otherwise, for this mineral property, the government should pay petitioners. Petro-Hunt, has, in fact, filed a suit in the United States Court of Federal Claims to recover just compensation for this property in the event the Court rules Petitioners do not have title to the property.[27] Petro-Hunt also seeks damages for the lease of its mineral property by the government. If the judgment of the Fifth Circuit is allowed to become final, Petro-Hunt will pursue its Court of Claims remedy against the government for what is, in effect, a judicially sanctioned inverse condemnation of its mineral rights. *See, e.g., Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1 (1984).

CONCLUSION

For the reasons stated above, this Court should grant this Petition to resolve the split among the circuits regarding these significant issues of *res judicata* and collateral estoppel, and to prevent any more rogue decisions about such basic judicial principles.

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27. This case is styled *Petro-Hunt, L.L.C. v. United States,* United States Court of Federal Claims No. 00-512L. The case is presently stayed, pending the outcome of the instant case.

Respectfully submitted,

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